

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
Millbrook Enterprises, Inc.	:	
Clearview Concrete Products Corp.,	:	
Grand Pre-Stressed Corp.,	:	AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill Ltd.	:	
	:	
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Corporation	:	
Franchise Tax under Article 9A of the Tax Law for	:	
the Years 1973, 1974 & 1975.	:	

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Millbrook Enterprises, Inc., one of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Millbrook Enterprises, Inc.
7 Sully Dr.
Monsey, NY 11030

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of August, 1981.

Annie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc. :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill Ltd. :
: :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years 1973, 1974 & 1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Leonard Lichter the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10016

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioners herein and that the address set forth on said wrapper is the last known address of the representative of the petitioners,

Sworn to before me this
14th day of August, 1981.

Carrie A. Hagelund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc. :
Clearview Concrete Products Corp. :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill Ltd. :
:
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years 1973, 1974 & 1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Clearview Concrete Products Corp., one of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Clearview Concrete Products Corp.
600 Old Country Rd.
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of August, 1981.

Connie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill, Ltd. :
:
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Years 1973, 1974 & 1975. :

State of New York
County of Albany

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Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioners herein and that the address set forth on said wrapper is the last known address of the representative of the petitioners.

Sworn to before me this
14th day of August, 1981.

Cornie A. Hagelund

[Signature]

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H. D. H. Realty Corp. and Colonie Ltd. :
: :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the F/Y/E 9/30/75. :

State of New York
County of Albany

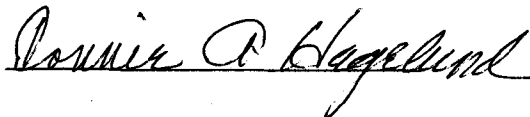
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon H. D. H. Realty Corp., one of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

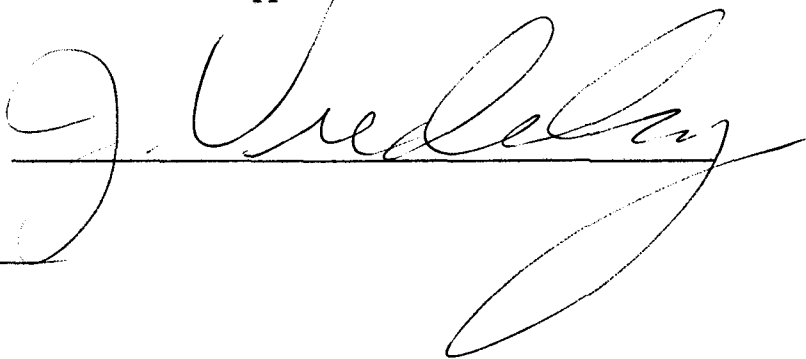
H. D. H. Realty Corp.
c/o Keller & Steinmuller
Att: Edward Steinmuller - One Penn Plaza
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of August, 1981.


Dennis A. Haglund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill, Ltd. :
:
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Years 1973, 1974 & 1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Leonard Lichter the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022

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Sworn to before me this
14th day of August, 1981.

Arnie A. Haglund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp. : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill Ltd. :
: :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law for :
the Years 1973, 1974 & 1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Colonie Hill, Ltd., one of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Colonie Hill, Ltd.
c/o Clearview Concrete Products Corp.
600 Old Country Rd.
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of August, 1981.

Annie A. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Millbrook Enterprises, Inc.,	:	
Clearview Concrete Products Corp.,	:	
Grand Pre-Stressed Corp.,	:	AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill, Ltd.	:	
	:	
for Redetermination of a Deficiency or a Revision	:	
of a Determination or a Refund of Corporation	:	
Franchise Tax under Article 9-A of the Tax Law	:	
for the Years 1973, 1974 & 1975.	:	

State of New York
County of Albany

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Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022

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Sworn to before me this
14th day of August, 1981.

Carrie A. Hagellund

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp. : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill Ltd. :
: :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law for :
the Years 1973, 1974 & 1975. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Grand Pre-Stressed Corp., one of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Grand Pre-Stressed Corp.
600 Old Country Rd.
Garden City, NY 11530

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of August, 1981.

Annunzio P. Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Millbrook Enterprises, Inc., :
Clearview Concrete Products Corp., :
Grand Pre-Stressed Corp., : AFFIDAVIT OF MAILING
H.D.H. Realty Corp. and Colonie Hill, Ltd. :
:
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Years 1973, 1974 & 1975. :

State of New York
County of Albany

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Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022

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That deponent further says that the said addressee is the representative of the petitioners herein and that the address set forth on said wrapper is the last known address of the representative of the petitioners.

Sworn to before me this
14th day of August, 1981.

Cornie A. Hoge

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

Millbrook Enterprises, Inc.
7 Sully Dr.
Monsey, NY 11030

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

Clearview Concrete Products Corp.
600 Old Country Rd.
Garden City, NY 11530

Gentlemen:

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NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Avenue
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

H. D. H. Realty Corp.
c/o Keller & Steinmuller
Att: Edward Steinmuller - One Penn Plaza
New York, NY 10001

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NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

Grand Pre-Stressed Corp.
600 Old Country Rd.
Garden City, NY 11530

Gentlemen:

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You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

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NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

Colonie Hill, Ltd.
c/o Clearview Concrete Products Corp.
600 Old Country Rd.
Garden City, NY 11530

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

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Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
MILLBROOK ENTERPRISES, INC.,	:	
CLEARVIEW CONCRETE PRODUCTS CORP.,	:	DECISION
GRAND PRE-STRESSED CORP.,	:	
H.D.H. REALTY CORP. and COLONIE HILL LTD.:	:	
for Redetermination of a Deficiency or	:	
for Refund of Corporation Franchise Tax	:	
under Article 9-A of the Tax Law for the	:	
Years 1973, 1974 and 1975.	:	

Petitioners, Millbrook Enterprises, Inc., 7 Sully Drive, Monsey, New York 11030; Colonie Hill, Ltd., c/o Clearview Concrete Products Corp., 600 Old Country Road, Garden City, New York 11530; Grand Pre-Stressed Corp., 600 Old Country Road, Garden City, New York 11530; H.D.H. Realty Corp., c/o Keller & Steinmuller, Attn: Edward Steinmuller, One Penn Plaza, New York, New York 10001 and Clearview Concrete Products, 600 Old Country Road, Garden City, New York 11530, filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1973, 1974 and 1975 (File Nos. 20191, 20192, 20193, 20194 and 20195, respectively).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1979 at 9:45 A.M. and continued before Robert A. Couze, Hearing Officer, on November 12, 1980 at 9:45 A.M. Petitioners appeared by Spitzer & Feldman, Esqs. (Michael J. Hassett, Esq., was of counsel August 22, 1979 and he and Leonard Lichter, Esq., were of counsel on November 12, 1980). The Audit Division appeared on August 22, 1979 by Peter Crotty, Esq. and on

November 12, 1980 by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., was of counsel on both dates).

ISSUE

Whether petitioners were properly denied an opportunity to file combined franchise tax returns.

FINDINGS OF FACT

1. By letter of January 3, 1974, Ira Palestin, Esq. submitted a request to file combined New York State franchise tax returns on behalf of Millbrook Enterprises, Inc. ("Millbrook"), Clearview Concrete Pipe Corp. ("Clearview"), Java Enterprises, Inc. ("Java") and Colonie Hill Ltd. ("Colonie Hill") for the fiscal year ended April 30, 1973. This request was supported by Memoranda of August 9, 1974 and January 24, 1975, which expressly extended the request to include the filing of a combined report by Grand Pre-Stressed Corp. ("Grand") and HDH Realty Corp. ("HDH") together with the corporations mentioned above for the fiscal year ended April 30, 1974. On April 2, 1975, Mr. Palestin and Mr. Steinmuller (a Certified Public Accountant whose firm had been retained by all of the petitioners throughout the fiscal years in question) met with Messrs. Vecchio, Henk and Gale of the New York State Department of Taxation and Finance (the "Department") regarding the request to file combined reports. By letter dated July 11, 1975, which apparently confirmed advice given orally at an earlier date, Mr. Vecchio confirmed the Department's decision to deny permission to file combined reports, extended the time to file reports for the fiscal years ended April 30, 1973, 1974 and 1975 and advised Mr. Palestin that, upon filing of the reports and receipt of Notice of Deficiency, a petition for redetermination of a deficiency could be filed.

2. A combined report was filed for Millbrook, Clearview, Java and Colonie Hill, for the fiscal year ended April 30, 1973 and for Grand and HDH, together with the foregoing corporations, for the fiscal years ended April 30, 1974 and 1975. The Department recomputed the tax due on an individual basis and issued statements of audit adjustment and notices of deficiency to each corporation other than Java.

3. The periods of liability and amount of tax deficiency are asserted by the Audit Division to be as follows:

(A) Millbrook Enterprises, Inc.:

Period Ending	4/30/73	\$1,762.00
Period Ending	4/30/74	\$3,045.00
Period Ending	4/30/75	\$3,635.00

(B) Colonie Hill, Ltd.

Period Ending	4/30/73	\$12,483.00
Period Ending	4/30/74	\$24,724.00
Period Ending	4/30/75	\$22,986.00

(C) Grand Pre-Stressed Corp.

Period Ending	4/30/75	\$34,848.00
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(D) H.D.H. Realty Corp.

Period Ending	4/30/74	\$687.00
Period Ending	4/30/75	\$467.00

(E) Clearview Concrete Products Corp.

Period Ending	4/30/73	\$60,545.00
Period Ending	4/30/74	\$58,319.00
Period Ending	4/30/75	\$40,169.00

4. Timely petitions for redetermination of the deficiencies were then filed on behalf of Millbrook, Colonie Hill, Grand, H.D.H. and Clearview.

5. Millbrook, for the fiscal year ending April 30, 1973, was 50 percent owned by Andrew DeLillo and the other 50 percent by his wife, Angelina DeLillo. For the fiscal years ending April 30, 1974 and 1975, Millbrook was owned by

Andrew, Angelina and their son Vincent. Andrew owned six shares; Angelina owned six and one-third shares and Vincent owned one share.

6. For all of the years in issue herein, Millbrook exclusively owned Java Enterprises, Inc., Clearview, Grand and H.D.H.; Java, in turn, was the exclusive owner of Colonie.

7. Millbrook owned some real estate, however, it primarily held stock in the other petitioner corporations, herein, and in Java; otherwise it conducted no other business.

8. Java did not conduct any business, whatsoever, except that it was a holding company; it held petitioner Colonie.

9. Clearview was a manufacturer of concrete pipe, manholes, catch basins and other concrete products. It also manufactured some concrete products for Grand.

10. Grand manufactured pre-stressed concrete products, i.e. beams, etc.

11. Colonie was a complex consisting of golf club, health club, catering facility, restaurant, hotel and motel.

12. H.D.H., for part of the years in issue, herein, owned the property that Grand occupied, then the property was sold to Clearview.

13. The corporations at times loaned each other funds and co-mingled some administrative costs.

14. Clearview financed Colonie's liquor license and operation and its employees also helped construct the Colonie complex.

15. The employees of both Clearview and Grand were members of the same employee union.

CONCLUSIONS OF LAW

A. That section 211.4 of the Tax Law in part authorizes the Tax Commission, in its discretion, to require or permit a domestic parent corporation and its wholly-owned domestic subsidiaries to make a report on a combined basis.

B. That during the periods at issue, the State Tax Commission provided (by regulation) that in determining whether the tax would be computed on a combined basis, it would consider various factors, including the following:

- (1) Whether the corporations were engaged in the same or related lines of business;
- (2) Whether any of the corporations were in substance merely departments of a unitary business conducted by the entire group;
- (3) Whether the products of any of the corporations were sold to or used by any of the other corporations;
- (4) Whether any of the corporations performed services for, or loaned money to, or otherwise financed or assisted in the operations of any of the other corporations;
- (5) Whether there were other substantial intercompany transactions among the constituent corporations.

(former 20 NYCRR 5.28(b))

The essential elements of these factors have been carried over into the current regulations which were effective for taxable years beginning on or after January 1, 1976 and which provide, in pertinent part:

In deciding whether to permit or require combined reports, the following two (2) broad factors must be met:

- (1) The corporations are in substance parts of a unitary business conducted by the entire group of corporations, and
- (2) There are substantial intercorporate transactions among the corporations.

(20 NYCRR 6-2.3(a) (Emphasis supplied)

The mandatory language of the current regulations takes cognizance of those elements which the Tax Commission has consistently deemed to be the key factors in determining whether combination should be permitted or required, i.e., the unitary nature of the business conducted by the corporations, and whether there were substantial intercorporate transactions among the corporations. (See: Petition of Annel Holding Corp., et al., State Tax Commission, August 2, 1973, Determination confirmed, Annel Holding Corp. v. Procaccino, 77 Misc. 2d 886 (Sup. Ct. Albany County, 1974); Petition of N. K. Winston Corporation, et al., State Tax Commission, August 21, 1974.)

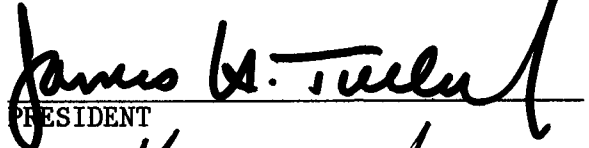
Petitioners herein have not only failed to show that they were each in substance, part of a unitary business, but have also failed to show that there were substantial intercorporate transactions between them. Accordingly, permission to file on a combined basis was properly denied.

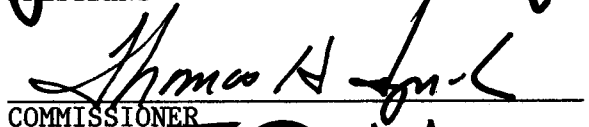
C. That the notice of deficiency issued against Millbrook Enterprises, Inc., Clearview Concrete Products Corp., and Colonie Hill, Ltd. each, for the years ending April 30, 1973, 1974 and 1975; H.D.H. Realty Corp. for the years ending April 30, 1974 and 1975 and Grand Pre-Stressed Corp. for the year ending April 30, 1975 are sustained and the petitions are denied.

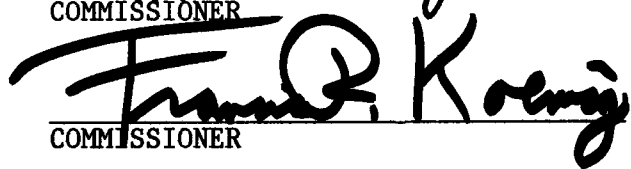
DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 14, 1981

Millbrook Enterprises, Inc.
7 Sully Dr.
Monsey, NY 11030

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Leonard Lichter
Spitzer & Feldman
745 Fifth Ave.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
MILLBROOK ENTERPRISES, INC.,	:	
CLEARVIEW CONCRETE PRODUCTS CORP.,	:	DECISION
GRAND PRE-STRESSED CORP.,	:	
H.D.H. REALTY CORP. and COLONIE HILL LTD.:	:	
for Redetermination of a Deficiency or	:	
for Refund of Corporation Franchise Tax	:	
under Article 9-A of the Tax Law for the	:	
Years 1973, 1974 and 1975.	:	

Petitioners, Millbrook Enterprises, Inc., 7 Sully Drive, Monsey, New York 11030; Colonie Hill, Ltd., c/o Clearview Concrete Products Corp., 600 Old Country Road, Garden City, New York 11530; Grand Pre-Stressed Corp., 600 Old Country Road, Garden City, New York 11530; H.D.H. Realty Corp., c/o Keller & Steinmuller, Attn: Edward Steinmuller, One Penn Plaza, New York, New York 10001 and Clearview Concrete Products, 600 Old Country Road, Garden City, New York 11530, filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1973, 1974 and 1975 (File Nos. 20191, 20192, 20193, 20194 and 20195, respectively).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 22, 1979 at 9:45 A.M. and continued before Robert A. Couze, Hearing Officer, on November 12, 1980 at 9:45 A.M. Petitioners appeared by Spitzer & Feldman, Esqs. (Michael J. Hassett, Esq., was of counsel August 22, 1979 and he and Leonard Lichter, Esq., were of counsel on November 12, 1980). The Audit Division appeared on August 22, 1979 by Peter Crotty, Esq. and on

November 12, 1980 by Ralph J. Vecchio, Esq. (Abraham Schwartz, Esq., was of counsel on both dates).

ISSUE

Whether petitioners were properly denied an opportunity to file combined franchise tax returns.

FINDINGS OF FACT

1. By letter of January 3, 1974, Ira Palestin, Esq. submitted a request to file combined New York State franchise tax returns on behalf of Millbrook Enterprises, Inc. ("Millbrook"), Clearview Concrete Pipe Corp. ("Clearview"), Java Enterprises, Inc. ("Java") and Colonie Hill Ltd. ("Colonie Hill") for the fiscal year ended April 30, 1973. This request was supported by Memoranda of August 9, 1974 and January 24, 1975, which expressly extended the request to include the filing of a combined report by Grand Pre-Stressed Corp. ("Grand") and HDH Realty Corp. ("HDH") together with the corporations mentioned above for the fiscal year ended April 30, 1974. On April 2, 1975, Mr. Palestin and Mr. Steinmuller (a Certified Public Accountant whose firm had been retained by all of the petitioners throughout the fiscal years in question) met with Messrs. Vecchio, Henk and Gale of the New York State Department of Taxation and Finance (the "Department") regarding the request to file combined reports. By letter dated July 11, 1975, which apparently confirmed advice given orally at an earlier date, Mr. Vecchio confirmed the Department's decision to deny permission to file combined reports, extended the time to file reports for the fiscal years ended April 30, 1973, 1974 and 1975 and advised Mr. Palestin that, upon filing of the reports and receipt of Notice of Deficiency, a petition for redetermination of a deficiency could be filed.

2. A combined report was filed for Millbrook, Clearview, Java and Colonie Hill, for the fiscal year ended April 30, 1973 and for Grand and HDH, together with the foregoing corporations, for the fiscal years ended April 30, 1974 and 1975. The Department recomputed the tax due on an individual basis and issued statements of audit adjustment and notices of deficiency to each corporation other than Java.

3. The periods of liability and amount of tax deficiency are asserted by the Audit Division to be as follows:

(A) Millbrook Enterprises, Inc.:

Period Ending	4/30/73	\$1,762.00
Period Ending	4/30/74	\$3,045.00
Period Ending	4/30/75	\$3,635.00

(B) Colonie Hill, Ltd.

Period Ending	4/30/73	\$12,483.00
Period Ending	4/30/74	\$24,724.00
Period Ending	4/30/75	\$22,986.00

(C) Grand Pre-Stressed Corp.

Period Ending	4/30/75	\$34,848.00
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(D) H.D.H. Realty Corp.

Period Ending	4/30/74	\$687.00
Period Ending	4/30/75	\$467.00

(E) Clearview Concrete Products Corp.

Period Ending	4/30/73	\$60,545.00
Period Ending	4/30/74	\$58,319.00
Period Ending	4/30/75	\$40,169.00

4. Timely petitions for redetermination of the deficiencies were then filed on behalf of Millbrook, Colonie Hill, Grand, H.D.H. and Clearview.

5. Millbrook, for the fiscal year ending April 30, 1973, was 50 percent owned by Andrew DeLillo and the other 50 percent by his wife, Angelina DeLillo. For the fiscal years ending April 30, 1974 and 1975, Millbrook was owned by

Andrew, Angelina and their son Vincent. Andrew owned six shares; Angelina owned six and one-third shares and Vincent owned one share.

6. For all of the years in issue herein, Millbrook exclusively owned Java Enterprises, Inc., Clearview, Grand and H.D.H.; Java, in turn, was the exclusive owner of Colonie.

7. Millbrook owned some real estate, however, it primarily held stock in the other petitioner corporations, herein, and in Java; otherwise it conducted no other business.

8. Java did not conduct any business, whatsoever, except that it was a holding company; it held petitioner Colonie.

9. Clearview was a manufacturer of concrete pipe, manholes, catch basins and other concrete products. It also manufactured some concrete products for Grand.

10. Grand manufactured pre-stressed concrete products, i.e. beams, etc.

11. Colonie was a complex consisting of golf club, health club, catering facility, restaurant, hotel and motel.

12. H.D.H., for part of the years in issue, herein, owned the property that Grand occupied, then the property was sold to Clearview.

13. The corporations at times loaned each other funds and co-mingled some administrative costs.

14. Clearview financed Colonie's liquor license and operation and its employees also helped construct the Colonie complex.

15. The employees of both Clearview and Grand were members of the same employee union.

CONCLUSIONS OF LAW

A. That section 211.4 of the Tax Law in part authorizes the Tax Commission, in its discretion, to require or permit a domestic parent corporation and its wholly-owned domestic subsidiaries to make a report on a combined basis.

B. That during the periods at issue, the State Tax Commission provided (by regulation) that in determining whether the tax would be computed on a combined basis, it would consider various factors, including the following:

- (1) Whether the corporations were engaged in the same or related lines of business;
- (2) Whether any of the corporations were in substance merely departments of a unitary business conducted by the entire group;
- (3) Whether the products of any of the corporations were sold to or used by any of the other corporations;
- (4) Whether any of the corporations performed services for, or loaned money to, or otherwise financed or assisted in the operations of any of the other corporations;
- (5) Whether there were other substantial intercompany transactions among the constituent corporations.

(former 20 NYCRR 5.28(b))

The essential elements of these factors have been carried over into the current regulations which were effective for taxable years beginning on or after January 1, 1976 and which provide, in pertinent part:

In deciding whether to permit or require combined reports, the following two (2) broad factors must be met:

- (1) The corporations are in substance parts of a unitary business conducted by the entire group of corporations, and
- (2) There are substantial intercorporate transactions among the corporations.

(20 NYCRR 6-2.3(a) (Emphasis supplied)

The mandatory language of the current regulations takes cognizance of those elements which the Tax Commission has consistently deemed to be the key factors in determining whether combination should be permitted or required, i.e., the unitary nature of the business conducted by the corporations, and whether there were substantial intercorporate transactions among the corporations. (See: Petition of Annel Holding Corp., et al., State Tax Commission, August 2, 1973, Determination confirmed, Annel Holding Corp. v. Procaccino, 77 Misc. 2d 886 (Sup. Ct. Albany County, 1974); Petition of N. K. Winston Corporation, et al., State Tax Commission, August 21, 1974.)

Petitioners herein have not only failed to show that they were each in substance, part of a unitary business, but have also failed to show that there were substantial intercorporate transactions between them. Accordingly, permission to file on a combined basis was properly denied.

C. That the notice of deficiency issued against Millbrook Enterprises, Inc., Clearview Concrete Products Corp., and Colonie Hill, Ltd. each, for the years ending April 30, 1973, 1974 and 1975; H.D.H. Realty Corp. for the years ending April 30, 1974 and 1975 and Grand Pre-Stressed Corp. for the year ending April 30, 1975 are sustained and the petitions are denied.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION


RESIDENT


COMMISSIONER


COMMISSIONER